

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RONNY LEYVA,

Plaintiff,

vs.

DWIGHT NEVEN, *et al.*,

Defendants.

2:10-cv-00084-KJD-RJJ

ORDER

This *pro se* prisoner civil rights action by an inmate in the custody of the Nevada Department of Corrections (“NDOC”) comes before the Court for initial review under 28 U.S.C. § 1915A.

When a “prisoner seeks redress from a governmental entity or officer or employee of a governmental entity,” the court must “identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b).

In considering whether the plaintiff has stated a claim upon which relief can be granted, all material factual allegations in the complaint are accepted as true for purposes of initial review and are to be construed in the light most favorable to the plaintiff. *See, e.g., Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). However, mere legal conclusions unsupported by any actual allegations of fact are not assumed to be true in reviewing the complaint. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949-51 & 1954, 173 L.Ed.2d 868

1 (2009). That is, bare, naked and conclusory assertions that merely constitute formulaic
2 recitations of the elements of a cause of action and that are devoid of further factual
3 enhancement are not accepted as true and do not state a claim for relief. *Id.*

4 Allegations of a *pro se* complainant are held to less stringent standards than formal
5 pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30
6 L.Ed.2d 652 (1972).

7 In the complaint, plaintiff Ronny Leyva alleges that High Desert State Prison (“High
8 Desert”) prison officials wrongfully confiscated and permanently deprived him of crime scene
9 photographs that he kept in his fire box for his legal files. He alleges that he was authorized
10 to have the crime scene photos in his possession when he previously was incarcerated at Ely
11 State Prison. He seeks monetary damages from, in their individual capacities, High Desert
12 Warden Dwight Neven, NDOC Deputy Director of Operations Greg Cox, and High Desert
13 Caseworker Roland Daniels. He alleges that each one of these officers was made aware of
14 the deprivation through the grievance process and had the authority to return the property but
15 chose not to do so. In four counts based upon these alleged facts, plaintiff alleges that he
16 was deprived of his property without due process of law in violation of the Fourteenth
17 Amendment, that he was subjected to an unreasonable seizure in violation of the Fourth
18 Amendment, that the confiscation violated his Sixth Amendment right to assist in his defense,
19 and that the deprivation violated a purported Eighth Amendment right to due process.

20 In Count I, plaintiff fails to state a claim under the Fourteenth Amendment for a denial
21 of procedural due process, due to the availability of an adequate state post-deprivation
22 remedy for the loss. *See Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 82 L.Ed.2d
23 393 (1984); *Parratt v. Taylor*, 451 U.S. 527, 543, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981),
24 *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d
25 662 (1986); N.R.S. 73.010; N.R.S. 41.031; N.R.S. 209.243.

26 In Count II, plaintiff fails to state a claim under the Fourth Amendment for an alleged
27 unreasonable seizure. In *Hudson*, the Supreme Court held that inmates have no expectation
28 of privacy in their personal property in prison and that the Fourth Amendment therefore is

1 inapplicable to a search or seizure of an inmate's personal property. See 468 U.S. at 522-30,
2 104 S.Ct. at 3198-3202. The Supreme Court made it clear that its holding that there was no
3 Fourth Amendment protection in this context applied fully to the alleged seizure and
4 destruction of property as well as to the search itself:

5
6 Respondent contends also that the destruction of his
7 personal property constituted an unreasonable seizure of that
8 property violative of the Fourth Amendment. Assuming that the
9 Fourth Amendment protects against the destruction of property,
10 in addition to its mere seizure, the same reasons that lead us to
 conclude that the Fourth Amendment's proscription against
 unreasonable searches is inapplicable in a prison cell, apply with
 controlling force to seizures. Prison officials must be free to seize
 from cells any articles which, in their view, disserve legitimate
 institutional interests. . . .

11 468 U.S. at 528 n.8, 104 S.Ct. at 3201 n.8. The Court noted that the prisoner's remedy in that
12 situation, just as with regard to the Fourteenth Amendment due process claim, was a state
13 post-deprivation remedy for the alleged destruction of the property. *Id.*

14 In Count III, plaintiff fails to state a claim under the Sixth Amendment for a violation of
15 his right to assist in his defense. Plaintiff already has been convicted, and he alleges that the
16 crime scene photos were from files relinquished by the public defender's office. The Sixth
17 Amendment right in question does not extend to an incarcerated convict, even one *arguendo*
18 considering retaining counsel in order to pursue post-conviction relief.

19 In Count IV, plaintiff fails to state a claim under the Eighth Amendment for a violation
20 of due process. Due process protections arise under the Fifth and Fourteenth Amendments
21 rather than the Eighth Amendment. As discussed above, plaintiff fails to state a due process
22 claim. The Eighth Amendment otherwise does not provide any applicable protection on the
23 facts alleged.

24 The complaint therefore will be dismissed for failure to state a claim upon which relief
25 may be granted. The Court finds that delaying dismissal for leave to amend would be futile.

26 IT THEREFORE IS ORDERED that the complaint is DISMISSED for failure to state
27 a claim upon which relief may be granted.

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DATED: November 5, 2010

KENT J. DAWSON
United States District Judge